IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs May 22, 2007

STATE OF TENNESSEE v. MARK ANTHONY VERMILLION

Appeal from the Criminal Court for Sullivan County
No. S47,563 R. Jerry Beck, Judge

No. E2006-01897-CCA-R3-CD - Filed August 10, 2007

The defendant, Mark Anthony Vermillion, pleaded guilty to acquiring a controlled substance by forgery, *see* T.C.A. § 53-11-402(a)(3) (2006), a Class D felony, forgery, *see id*. § 39-14-114, and theft of property under $500, *see id*. § 39-14-103, a Class A misdemeanor.[1] As a result of his plea agreement, he received an effective sentence of two years and six months with the manner of service to be determined by the trial court. After an evidentiary hearing, the trial court ordered the defendant to serve his entire sentence in the Department of Correction. The defendant appeals the trial court's order and claims that the court erred in denying full probation or some other form of alternative sentencing. We hold that the trial court did not err and affirm that court's order.

Tenn. R. App. P. 3; Judgments of the Criminal Court are Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ALAN E. GLENN, JJ., joined.

Stephen M. Wallace, District Public Defender; and Joseph F. Harrison, Assistant Public Defender, for the Appellant, Mark Anthony Vermillion.

Robert E. Cooper, Jr., Attorney General & Reporter; Rachel West Harmon, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Joseph E. Perrin, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The evidence showed that on February 26, 2003, Thomas Finch dropped off a valid prescription for MS Contin, a controlled substance, to Holston Valley Medical Center Pharmacy and left. The defendant was present in the pharmacy having a valid prescription of his own filled. The pharmacy technician called Mr. Finch's name, then mistook the defendant for Mr. Finch, and informed the defendant that he could not have all 160 MS Contin pills but just 60 pills. The

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[1] The court merged counts one and two.

defendant, recognizing this drug, forged Mr. Finch's name, took the pills, and left the pharmacy. He testified that he took the pills to give to his wife, who had degenerative disc disease, to help with her pain because her medical insurance would not pay for pain medication.

The next day the pharmacy called the defendant and informed him of the mistake and that he needed to return the pills. He told the pharmacy that he had already "flushed" the pills and did not have them anymore.

The testimony also showed that the defendant had been molested as a child, only completed the eleventh grade in special education classes, had been homeless at one point for a few years, and had accumulated juvenile and adult criminal records. The defendant also suffered numerous mental and physical problems. He was diagnosed as bipolar and manic-depressive and had obsessive-compulsive disorder. Physically, the defendant had suffered a stroke, a fractured neck, a fractured fibula, and colon cancer. The defendant had also abused alcohol and marijuana in the past. He testified that he was sorry for taking the MS Contin from the pharmacy by forging Mr. Finch's name.

The trial court found that the defendant had a juvenile record and 15 prior probations for misdemeanor convictions as an adult, one as recent as 2005. The court noted that the defendant dropped out of school, lacked a normal work record, and did not get his General Education Degree as previously ordered by the court as part of one probation. The court found that the defendant suffered from various mental and physical health problems. The court also found that the defendant justified his conduct because he took the pills for his wife, but the court noted that the defendant did not take the pills back to the pharmacy the next day despite the opportunity to do so.

The court stated that it weighed the positive and negative factors and looked for sentencing alternatives. The court concluded that the negative factors were more weighty and stated that the defendant had received too many suspended sentences; thus, the court ordered the defendant to serve his sentence in confinement.

On appeal, the defendant claims that the trial court erred in denying him full probation or an alternative sentence.

When there is a challenge to the manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2006). This presumption is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appellant. *Id*. In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id*. If appellate review, however, reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn.

Crim. App. 1991).

The mechanics of arriving at an appropriate sentence are spelled out in the Criminal Sentencing Reform Act of 1989. The court is required to consider (1) the evidence, if any, received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-210(a), (b), -35-103(5) (2006).

I. Probation

We note that the defendant was statutorily eligible to serve a suspended sentence. *See* T.C.A. § 40-35-303(a) (2006). The determination of entitlement to full probation necessarily requires a separate inquiry from that of determining whether a defendant is entitled to a less beneficent alternative sentence. *See State v. Bingham*, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9-10 (Tenn. 2000). A defendant is required to establish his "suitability for full probation as distinguished from his favorable candidacy for alternative sentencing in general." *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); *see* T.C.A. § 40-35-303(b) (2006); *Bingham*, 910 S.W.2d at 455-56. A defendant seeking full probation bears the burden of showing that probation will "subserve the ends of justice and the best interest of both the public and the defendant." *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990), *overruled on other grounds by Hooper*, 29 S.W.3d at 9.

In the present case, we cannot disagree with the trial court's implicit finding that the defendant failed to carry his burden of showing that probation would "subserve the ends of justice and the best interest of both the public and the defendant." *Dykes*, 803 S.W.2d at 259, *overruled on other grounds by Hooper*, 29 S.W.3d at 9; *see also State v. Aleta Renee Souder*, No. E2004-02190-CCA-R3-CD, slip op. at 6 (Tenn. Crim. App., Knoxville, Aug. 30, 2005) (holding that defendant's pre-existing disabilities did not amount to an effective demonstration that the defendant was a suitable candidate for probation nor were they sufficient to show the defendant was not a danger to society).

II. Alternative Sentencing

The defendant argues that the trial court erred in denying him an alternative sentence.

The defendant is a standard, Range I offender convicted of a Class D felony. As such, he is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. *See* T.C.A. § 40-35-102(6) (2006). However, this presumption does not entitle all offenders to alternative sentences; rather, it requires that sentencing issues be determined by the facts and circumstances presented in each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

The presumption of favorable candidacy for alternative sentencing in general, which is applicable in the present case, may be overcome by showing that at least one of the conditions set forth in Tennessee Code Annotated section 40-35-103(1) is met. *See, e.g., State v. Jimmy Ray Dockery*, No. E2004-00696-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., Knoxville, Nov. 30, 2004) ("Although the defendant enjoyed the presumption of favorable candidacy for alternative sentencing, the record reveals two solid bases for overcoming the presumption: (1) that confinement is necessary to restrain a defendant who has a long history of criminal conduct and (2) that measures less restrictive than confinement have recently been applied unsuccessfully to the defendant."); *State v. Christopher C. Rigsby*, No. E2003-01329-CCA-R3-CD, slip op. at 4 (Tenn. Crim. App., Knoxville, Dec. 29, 2003) ("[T]he record in this case amply demonstrates that the presumption of favorable candidacy for alternative sentencing in general was soundly rebutted by the defendant's extensive history of lawless behavior," citing Tennessee Code Annotated section 40-35-103(1)(A)); *see also State v. Nunley*, 22 S.W.3d 282, 286 (Tenn. Crim. App. 1999) (stating that although the factor "social history" must be considered "in determining whether to grant probation. . ., social history is not specifically mentioned by the code as a factor to be used in overcoming the presumption of suitability for alternative sentences"). These considerations include:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

T.C.A. § 40-35-103(1) (2006). The defendant concedes that subsection (A) is applicable in this case; however, he argues that his case is not appropriate for "mechanical application of the statute" because, in essence, he is not a danger to society nor does he lack the potential for rehabilitation.

As the statute provides, only one condition needs to be met to overcome the presumption of favorable candidacy for alternative sentencing. Here, the defendant has a long history of criminal conduct; he garnered a juvenile record and 15 adult misdemeanor convictions, one as recent as 2005, controverting the defendant's claim that his offenses were committed when he was younger. Thus, we affirm the trial court's order denying alternative sentencing. *See Aleta Renee Souder*, slip op. at 6-7 (upholding denial of alternative sentencing despite defendant's pre-existing disabilities because of defendant's long history of criminal conduct and use of marijuana during pending case).

III. Conclusion

Based upon the foregoing analyses, we affirm the trial court's judgments.

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JAMES CURWOOD WITT, JR., JUDGE